No. 79-1734

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCES LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF NEW JERSEY AS AMICUS CURIAE

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BRIEF FOR THE STATE OF NEW JERSEY AS AMICUS CURIAE

Interest of the Amicus

The State of New Jersey, acting by and through its Attorney General, respectfully submits this brief as amicus curiae, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, because of its importance to the State in the operation of its state penal,

correctional and training institutions for convicted offenders.

The State of New Jersey has been engaged in the operation of penal, correctional and training institutions for many years. As in most states, the facilities are not self supporting but financed by state appropriations, staffed by state civil service employees, and operated for the incarceration of offenders who, with the exception of a limited number of inmates on work release programs, do not contribute towards the costs of their care and custody.

The State operates three major prisons, four large correctional institutions, two training schools for youthful offenders, five residential group centers, an adult diagnostic center, five community treatment centers, nine parole offices and numerous satellite facilities. It has approximately 6,400 offenders in custody in state institutions and 9,600 parolees under in-state supervision. In addition, there are twenty-six jails and other penal institutions operated by the various counties in New Jersey, housing over 5,000 offenders in custody.

The New Jersey Department of Corrections provides professional and administrative leadership in the planning, programming, and operation of penal and correctional facilities for the State. Its present role is a complex one and includes, consistent with modern penological aims, stimulating the development of non-State operated community alternatives to incarceration, half-way houses, work-release programs, and the promulgation and enforcement of minimum standards for county penal institutions. The traditonal function of the State in the operation of large penal institutions, however, remains a major undertaking of the State, as it is for most states. New Jersey State appropriations for the 1980 fiscal year for operating the various state penal institutions are approximately $86,000,000.

The present case brings into focus the collision of the modern penological concept which permits inmates to keep an array of personal belongings and creature comforts during imprisonment with the novel legal precedent reached below in this case, which will undoubtedly cause humanitarian prison officials who permit such practices to become the targets of federal civil rights actions whenever such inmate property is allegedly lost, damaged, destroyed, or stolen, due to simple negligence.

New Jersey is one of the states which favors permitting inmates to keep personal belongings with the clear understanding, however, that the institution is not an insurer of such belongings. In connection with personal property held by inmates of New Jersey institutions, all inmates are advised in writing that any personal property held by them is held at their own risk* (Standards, Department of Corrections, §209.262) and that any personal property they retain of substantial value, such as personally owned radios, must be marked for identification (Id., §209.271).

Upon arrival at the New Jersey prison the inmate receives a handbook of inmate rights and duties which inform him that he is permitted a large and varied quantity of personalty. He may have appliances, including a fan, television, portable radio, electric razor, ice chest. He may have food and beverages, books, newspapers, periodicals,

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* As to articles not kept by the inmates, Department Standards contain policies and procedures for safekeeping valuables, clothing and money taken from inmates on their admission or received by them during incarceration. The inmate is given a signed receipt for such valuables, and they are placed in a heavy manila envelope, suitably inscribed with the inmate's name, and placed in a fire-proof safe under lock at all times. Valuables not retained are sent to the inmate's home by insured mail or railway express, etc. Standards, §309.

photographs, pictures, typewriters, hobby equipment, rugs, curtains, and shelves, etc. The wardrobe permitted, per inmate, alone, consists of the following:

3 pair of long trousrers (State issue only)

3 pair of shorts (State issue only)

7 set of underwear

7 pair of socks

2 pair of shoes or work boots (limited to six inches from the bottom of the heel to the top) no platform shoes permitted

2 pair of sneakers

1 pair of slippers

7 short or long sleeve shirts any color or color combination except solid blue

2 sweaters

2 sweatshirts with or without hoods

1 sweatsuit

2 sets of thermal underwear

1 bathrobe

8 towels

5 handkerchiefs

1 hat—state issue

1 outer wear jacket—state issue

2 pair pajamas

5 wash cloths

2 belts—1¾ inch maximum width, no large buckles

In view of the result reached by the courts below in the instant case, the New Jersey penological practice of permitting inmates to have a considerable amount of personal property in their possession should also be viewed with an eye to the State's experiences at its Trenton State Prison concerning claims by its inmates for loss or damage to inmate personalty.

At Trenton State Prison, the average inmate population for the three year period 1977-1980 was 953 inmates. During that same period, the prison received a total of 329 claims by its inmates for lost, damaged or destroyed property. The claims varied from approximately $9 to $4000, but averaged approximately $200, and certain inmates submitted more than one claim. The claims related to property stolen by other inmates, property that an inmate was forbidden to have, property that inmates had given or bartered away to other inmates, property that inmates claimed had been damaged during a search or transfer, property that vanished after an inmate escaped, property that was proved to be owned by an inmate other than the claimant, etc. Approximately 5% of the claims were found, after investigation, to be valid, and in those cases the inmate received compensation.* The overwhelming number of claims related to property that the inmate could not demonstrate that he had ever owned, or received, or that he was permitted to have, etc. It was also determined that the claims submitted were for inflated values running approximately triple the property's worth.

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* During the three year period ending November 18, 1980, the Department of Corrections approved 276 claims for payment filed by inmates of the Department's seven major institutions. These ranged from $1.19 to $250.00 and the majority of the claims filed were for sums of less than $30.00.

The State of New Jersey endorses the humane principle that state prison inmates should be permitted to have a variety of personal property and belongings while they are serving their terms in incarceration. It also believes that penal administrators should reimburse an inmate, pursuant to internal state administrative mechanisms, for the loss or damage of such personal property, shown to be actually owned by the inmates, consisting of the type of property he is permitted to have under prison rules, and which is lost or damaged through the negligence of the prison administration. Nevertheless, given the serious problems of revenue-raising and the allocation of limited governmental resources among numerous vital state services, the State of New Jersey, as amicus curiae, has a vital interest in seeking a reversal of the decision below. The recognition of a constitutional right to the protection of an inmate's personal property from loss or damage caused by mere simple negligence, as a basis for a money damages award against state prison officials personally, tends to make insurers of prison officials, may well force them to curtail inmate belongings out of necessity, and will not advance any state's efforts to improve its prison system. Instead, funds will be diverted to finance the legal defense or indemnification of overworked and modestly paid prison personnel who will be suable by present and former inmates for violation of a heretofore undefined constitutional right to be free from negligence. The State of New Jersey, therefore, strongly urges the court to reverse the decision of the court below.

ARGUMENT

POINT I

An inmate whose property is lost or missing following the mere negligent failure of prison officials to adhere to normal procedures regarding receipt of incoming packages does not thereby sustain a deprivation of Fourteenth Amendment rights cognizable under 42 U.S.C. §1983.

One issue the Court is asked to decide in this case is whether a plaintiff who alleges conduct on the part of a state officer which amounts to no more than mere negligence has stated a cause of action under 42 U.S.C. §1983. As recognized by the Court, that issue

> ". . . is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action." *Baker* v. *McCollan,* 443 U.S. 137, 140-141 (1979).

On the two prior occasions in which the Court was presented with this issue, it was able to dispose of the cases on other grounds and was thus not required to decide it. *Baker, id.; Procunier* v. *Navarette,* 434 U.S. 555 (1978).

Before the Court should address the state of mind requirements for §1983 liability generally, however, it must first consider and decide the threshold issue whether the deprivation of a federally protected right has occurred. *Baker, supra; Martinez* v. *California,* —— U.S. ——, 100 S. Ct. ——, 62 L. Ed. 2d 481 (1980). Section 1983 imposes liability only upon one

> "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .*" (emphasis added).

Hence, in the absence of the occurrence of a deprivation of a right "secured by the Constitution and laws", there can be no liability under §1983. In the instant case, in reaching the conclusion of §1983 liability, both the District Court for the District of Nebraska and the Court of Appeals for the Eighth Circuit apparently presupposed a deprivation of respondent's Fourteenth Amendment rights by the loss of his hobby kit following an inadvertent failure on the part of appellants to comply with prison procedures calling for an inmate to receipt packages incoming to him. Such presupposition was patently erroneous and will have the effect, if left uncorrected, of stretching the Fourteenth Amendment and 42 U.S.C. §1983 far beyond their intended scope, thereby transforming federal courts entertaining §1983 claims into courts of general tort jurisdiction. Clearly, wholly apart from the relationship of the Fourteenth Amendment to *de minimus* property claims (see Point II, *infra*), insufficient causal connection between the loss and the conduct of appellants and insufficient culpability on their part existed to establish a deprivation of respondent's Fourteenth Amendment rights.

There can be no §1983 cause of action against the prison officials in this case because any evidence that it was their action which deprived respondent of his property is entirely lacking. Initially, the Fourteenth Amendment provides that "no *state* shall . . . deprive any person

of life, liberty or property. . . ." (emphasis added). Moreover, as this Court noted in *Baker, supra,* 433 U.S. at 142, a public official is liable under §1983 only "if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights. . . ." *Cf. Rizzo* v. *Goode,* 423 U.S. 362 (1976). The issue, then, becomes the causal nexus which is constitutionally required to establish the necessary state action for a violation of the Fourteenth Amendment and §1983. This Court has very recently addressed that issue in *Martinez* v. *California, supra.*

In *Martinez,* the survivors of a 15-year-old girl who was murdered by a parolee brought a §1983 action against California officials responsible for the parole decision, contending that their actions deprived the decedent of her life without due process of law. Rejecting that argument and holding that the murder was too remote a consequence of the decision to parole to establish state action under the Fourteenth Amendment, the Court in a unanimous opinion declared:

> "Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later can not be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, . . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment." 62 L. Ed. 2d at 489.

It is clear from *Martinez* that, in order to demonstrate a violation of the Fourteenth Amendment and, hence, §1983

liability, there must exist a very close, direct causal nexus between the conduct complained of and the alleged deprivation. It is equally clear that the constitutionally required causation does not necessarily track the state law tort concept of causation. Again, in this case, the required causal connection has not been shown. There is simply nothing in the record to suggest that either appellant, or any state official, took or even lost respondent's hobby kit. Quite conceivably, the kit may have been taken by another inmate and converted to his own use. Accordingly, the mere fact that inadvertence on the part of appellants may have permitted the occurrence of an occasion for the taking or loss of the property is insufficient to establish a deprivation of property within the intendment of the Fourteenth Amendment. See *Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (no state action where prison official's failure to close cell door permitted the subsequent loss of trial transcript).

Just as the lack of requisite causal connection precludes a §1983 cause of action based upon violation of the Fourteenth Amendment here, so also does the absence of a level of culpability on the part of appellants exceeding simple negligence. Separate from any additional qualification §1983 may on its own impose, the state of mind or degree of fault of a defendant state official is relevant in determining whether a constitutional deprivation has occurred. See *Baker, supra.* Although this Court has not directly addressed the question in reference to claimed deprivations under the Due Process Clause of the Fourteenth Amendment and §1983, it has in other areas not hesitated to impose a requirement of intentional conduct as a condition necessary for the occurrence of a contitutional violation. See, *e.g., Estelle* v. *Gamble,* 429 U.S. 97 (1976) (no violation of Eighth Amendment unless deliberate indifference

to serious medical needs of inmate demonstrated); *Washington* v. *Davis,* 426 U.S. 229 (1976) (in absence of racially discriminatory purpose, statute having racially disproportionate impact not unconstitutional). Even in a case involving §1983 and the Fourteenth Amendment's Due Process Clause, though not deciding it on degree of fault, this Court recognized the concerns involved in permitting the establishment of a constitutional deprivation on a showing of simple negligence. In *Paul* v. *Davis,* 424 U.S. 693 (1976), in which the plaintiff contended the posting of his name among those of known shoplifters violated the Fourteenth Amendment, the Court first questioned why, if there were a violation under such circumstances, there could not also be a violation where a government vehicle negligently driven by a sheriff struck and killed a pedestrian, and then stated:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result. . . ." *Id.,* at 698-699.
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> * * *
>
> "But [respondent's] reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.,* at 701.

The manifest implication of cases such as *Estelle* v. *Gamble, Washington* v. *Davis* and *Paul* v. *Davis* is that, in order

to establish a violation of the Fourteenth Amendment Due Process Clause, the party claiming same must show more than mere negligence on the part of the state official.

Arguing strongly in favor of, if not mandating, such a conclusion is the common purpose of the Fourteenth Amendment and §1983, the legislative measure to enforce that amendment. There can be no doubt but that that purpose is to prevent and remedy abuse of official position —the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." See *United States* v. *Classic,* 313 U.S. 229, 326 (1941); *Monroe* v. *Pape,* 365 U.S. 171 (1961). The term "abuse" or "misuse" connotes intentional conduct on the part of the actor. Hence, it is appropriate that intentional conduct suffice to establish a violation of the Due Process Clause and §1983. Simple negligence, however, implies no more than inadvertence or mistake caused by heedlessness or carelessness in the face of a risk which the reasonable person would not take. See Prosser, *The Law of Torts,* §31 (4th ed. 1971). As it does not implicate the concept of abuse, it would further no purpose of the Fourteenth Amendment or §1983 to permit a cause of action which charges a state officer only with negligence. Therefore, respondent's claim of unconstitutional deprivation of property, being premised upon appellants' alleged simple negligence, must fail.

POINT II

Even if, arguendo, state prison officials may be held liable for money damages for mere simple negligence involved in the loss or damage of inmate property, the inmate property herein valued at $23.50 is de minimis, and its loss should not invoke the protections of the Fourteenth Amendment.

This Court has indicated that the general rule which requires some form of notice and hearing before deprivation of a property interest would not be applicable in situations where the property interest involved can be characterized as de minimis. *Fuentes* v. *Shevin,* 407 U.S. 67, 90 n.21 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

The maxim "De minimis non curat lex", meaning "The law does not care for small things", states a well-recognized principle and is generally used when very small errors are urged. "De minimis" in the law has always been taken to mean trifles—matters of a few dollars or less. 26A *C.J.S. De Minimis,* p. 175. Under the doctrine, a court of original jurisdiction may refuse to take jurisdiction of an action based upon a wrong which constitutes only a trifling invasion of the plaintiff's rights or results only in trifling damage. 1 *Am.Jur.2d Actions,* §67. In *Goulding* v. *Farrell,* 106 Minn. 44, 117 N.W. 1046 (Sup.Ct. 1908), the court held that the basis of the maxim is that mere trifles or technicalities must yield to practical common sense and substantial justice. See also, generally, *Annotation, "De Minimis Non Curat Lex",* 44 A.L.R. 168 (1926) indicating that the maxim operates in courts of law only in cases where no right other than to recover money is involved, and that a "trifle" is a relative term, depending upon circumstances and, in some degree, the amount involved in the suit.

The Circuit Courts have taken conflicting positions as to the applicability of the de minimis doctrine in state prisoner §1983 civil rights litigation against their keepers. Some courts have applied the doctrine, *e.g., Northern* v. *Nelson,* 448 F.2d 1266 (9th Cir. 1971) (involving seven copies of the newspaper "Muhammad Speaks" worth $1.05), *Nickens* v. *White,* 536 F.2d 802 (8th Cir. 1976) (involving a catalog of office supplies); *Pitts* v. *Griffin,* 518 F.2d 72 (8th Cir. 1975) (involving one F.M. radio); *Howard* v. *Swenson,* 426 F.2d 277 (8th Cir. 1970), *cert. den.* 400 U.S. 948 (1970) (several pairs of civilian shoes); *Lingo* v. *Boone,* 402 F.Supp. 768 (N.D.Cal. 1975) (withholding a newsletter).

Other courts have refused to apply the doctrine *Ferranti* v. *Moran,* 618 F.2d 888 (1st Cir. 1980) (destruction of a radio); *Bonner* v. *Coughlin,* 517 F.2d 1311, 1314 (7th Cir. 1975) (a trial transcript of "limited and uncertain monetary value"); *Carroll* v. *Sielaff,* 514 F.2d 415 (7th Cir. 1975) (involving a typewriter and currency). The Third Circuit, in particular, refused to invoke the doctrine in, and reversed a trial court's dismissal of, a prisoner's civil rights action against a guard arising out of the latter's confiscation of a mere seven packages of cigarettes. *Russell* v. *Bodner,* 489 F.2d 280 (3rd Cir. 1973).*

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* In his separate opinion, Judge Adams stated that although he concurred that de minimis should not be invoked, he found the result perplexing and not satisfactorily explainable:

> "I am constrained to concur in the result reached by the Court in this case, and do so solely on the ground that the complaint sufficiently states a section 1983 cause of action to survive a motion to dismiss. Having been reluctantly persuaded that the ancient maxim 'de minimis non curat lex' does not apply to civil rights actions such as the one

(Footnote continued on following page)

As indicated previously, inmates in the New Jersey prison system are permitted to keep and use numerous personal items and belongings. They file a large volume of claims for the alleged loss or damages of such personalty, including approximately 110 claims per year at the Trenton Prison alone. The Department of Corrections, after investigation, has been approving and paying claims filed by the inmates of the State's seven major institutions in approximately 100 cases a year, and such claims for the most part are for sums less than $30, and as small as $1.19.

Unless this Court reverses the decision reached herein, every penal administrator in America will be faced with the future prospect of civil liability for all loss or damage to inmate property which may result from simple negligence. It is not unrealistic to predict that such a result will cause a shift from inmate usage of the state prison administrative claims system to inmate filings of Sec. 1983 civil rights litigation in the United States District Courts in even greather volume than occurs today. Based on the

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(Footnote continued from preceding page)

presented here, it is my view that this Court has no choice but to conclude that the district court erred in dismissing the complaint as frivolous.

This result may well be expected to come as a surprise to the district judge who dismissed the complaint. It will also no doubt generate a certain amount of disbelief in those taxpayers and citizens generally, not to mention judges and lawyers, who will ask how federal courts have come to be concerned with a case in which a state prisoner alleges simply that his constitutional rights were violated when a prison guard took seven packages of cigarettes from him. I have yet to answer this question satisfactorily for myself" (489 F.2d at 281-282).

New Jersey experience, it is not unreasonable to anticipate and project that this infusion of significantly greater inmate §1983 litigation will merely serve to further burden the federal court system and the prison administrators. Even if, arguendo, state prison officials may be held liable for money damages for purely simple negligence involved in the loss or damage to inmate property, it is strongly urged that the Court, at the very least, should exercise its discretion and rule that in cases involving inmate property with very small monetary values, the Courts should not reject, but follow, the de minimis rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below upholding an award of money damages against the state prison authorities under the Civil Rights Act is erroneous and therefore should be reversed.

Respectfully submitted,

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